Supreme Court, U.S.
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No. 95-404

In the Supreme Court of the United States

October Term, 1994

GEROLD A. SEBULSKY,
Petitioner,

vs.

LINFORD RICHARDSON, EDWARD BLEVINS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Are defendants entitled to the benefit of the qualified immunity as an immunity against suit based upon their decision in February, 1991 to deploy a police dog to apprehend a man who, while driving a stolen pickup truck, had engaged in a high speed, reckless police chase and who was believed to be armed and who was hiding in a densely vegetated area, refusing to heed loudly broadcast warnings to give himself up before a police dog would be used?

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Preliminary Statement

This petition for writ of certiorari seeks to undo decades of this Court's decisional law on the qualified immunity in federal civil rights actions. As this Court has held on innumerable occasions, police officers are immune from suit unless it can be said that no reasonable police officer would have believed their actions to be lawful, in

light of clearly established law and the facts and circumstances known to them at the time. *Hunter v. Bryant*, 502 U.S. 224, 116 S.Ct. 534, 116 L.Ed.2d 589 (1991); *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). "[T]he courts should ask whether the [officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter, supra*, 502 U.S. at 228.

This incident occurred in 1991. At the time, there was no clearly established law that the use of police dogs constitutes excessive force under the Fourth Amendment. To the contrary, even today, numerous courts have upheld the constitutionality of the use of police dogs under remarkably similar fact patterns. The release of police dogs to apprehend dangerous concealed suspects does not constitute "deadly force." *Fikes v. Cleghorn*, 47 F.3d 1011 (9th Cir. 1995); *Mendoza v. Block*, 27 F.3d 1337 (9th Cir.

1994); *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994); *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988); *People v. Rivera*, 8 Cal.App.4th 1000, 10 Cal.Rptr.2d 785 (1992).

Plaintiff's petition for writ of certiorari betrays political, not legal motivations. This is richly demonstrated by plaintiff's gratuitous claim that "police work is not significantly more dangerous than the average job." Petition at p. 10. Plaintiff also opines that "well-trained" police officers "rarely" use any force at all to apprehend a suspect, and that there is no "legitimate" need for police dogs as a form of reasonable force. *Id.* at 9.

Such advice is ill-taken from a convicted criminal, who understandably has little motivation to promote public safety since it may cost him his chosen livelihood. Plaintiff's expertise in effective police work is as suspect as he was on the night of the incident.

As to plaintiff's claim that police work is no more

dangerous than any ordinary job, Judge Trott perhaps said it most cogently:

> "The walls of law enforcement memorials across our nation are inscribed with the names of unsuspecting officers slain in routine traffic stops by persons like [plaintiff.] . . . . Ferreting out hiding criminals is a precarious task. . . . . When a real police officer is assaulted, real injury can occur. This is precisely why the police used trained dogs. The dogs can quickly find hiding criminals, and thankfully, they can do so without endangering the lives of the police officers for whom the dogs work." *Chew, supra,* at 27 F.3d at 1464-1465, Trott, J., concurring and dissenting.

Under these circumstances, plaintiff has not provided this Court with any grounds for certiorari. Officer Blevins

and Chief Richardson, like their counterparts in *Fikes, Chew, Mendoza* and *Robinette*, are entitled to the benefit of the qualified immunity.

Statement of the Case

Plaintiff Gerald Sebulsky filed a civil rights complaint for excessive force against nine individual defendants and the City of Riverside on January 27, 1992 arising out of an incident which occurred on February 4, 1991, while plaintiff, then on probation, was driving a stolen pickup truck. (CR 1.) Following a high speed vehicle pursuit, plaintiff, who was believed to be armed, hid in a bushy area and was captured only after the police deployed a police dog to locate him. Plaintiff heard the warning announcements, but ignored them.

Among others, plaintiff sued Police Chief Linford (Sonny) Richardson, who was the police chief for the City of Riverside, as well as officer Edward Blevins, the police dog

handler. (CR 1.)

Chief Richardson and Officer Blevins moved for summary judgment based upon the qualified immunity. (CR 66-69.) They filed an interlocutory appeal to the Ninth Circuit from the denial of their motion for summary judgment. (CR 87, 90.)

On February 3, 1995, the Ninth Circuit issued a memorandum opinion vacating the district court order and directing that summary judgment be granted. The decision, which was unanimous, was not certified for publication.

The decision did not finally dispose of this case. The City of Riverside remains as a defendant.

Statement of the Facts

The incident occurred while plaintiff was driving a stolen Mazda pickup truck at 2:00 in the morning. (ER 21:12-14, 22-24.) A local police officer, who believed plaintiff was driving under the influence, transporting a

stolen scooter and driving without any headlights, attempted to stop plaintiff by turning on his overhead lights and siren. (ER 24:16-25, 64 at ¶3.) Plaintiff admits that he fled cause he was on probation from a prior criminal sentence and would go to prison if apprehended. (ER 27:23-28:3.) A massive car chase ensued, with plaintiff recklessly driving the truck in speeds of 85 miles per hour, narrowly missing various deputies and innocent passers-by. (ER 26:24-25, 25:16-20; 54 at ¶¶4-5 and 64-65 at ¶¶3-4.)

Plaintiff intentionally crashed the truck into a tree and fled on foot into a densely vegetated area which was familiar to him. (ER 28:8-23; 30:8-31:11.) The police officers, believing plaintiff to be armed, requested that a police dog handler be sent to the scene. (ER 72 at ¶4.)

Officer Blevins unsuccessfully searched for plaintiff for about an hour with his police dog on a leash. (ER 72-73 at ¶4.) Numerous warnings were made by both individual

police officers and by an overhead helicopter that a police dog would be used if plaintiff did not come out of hiding. (ER 55 at ¶7; 72 at ¶4.) Plaintiff heard the announcements, but could not remember them, although he understood that the police were trying to communicate with him. (ER 32:7-34:2.) He refused to come out, and was found by a police dog, which grabbed him by the arm. (ER 38:17-24, 43:16-45:5.) Officer Blevins called off the dog as soon as he heard the dog locate plaintiff. (ER 45:6-10, 72-73 at ¶5.) Plaintiff was arrested for stealing the truck. (ER 55 at ¶9; 65 at ¶8.)

Chief Richardson was not involved in plaintiff's apprehension, arrest or detention. (ER 52 at ¶5.)

Argument

THERE WAS NO CLEARLY ESTABLISHED LAW IN FEBRUARY 1991 THAT THE USE OF A POLICE DOG, UNDER THE FACTS AND CIRCUMSTANCES KNOWN TO DEFENDANTS AT THE TIME WAS OBJECTIVELY UNREASONABLE AND VIOLATED PLAINTIFF'S CONSTITUTIONAL RIGHTS.

Plaintiff's brief runs far afield from the ante-bellum slaveholding South to the "superior orders" defense of the Nuremberg trials.

Plaintiff would have done better had he stuck more closely to the existing decisional law on the deployment of police dogs. Even the badly flawed opinion of the Ninth Circuit in *Chew v. Gates* recognized that the "use of police dogs to search for and apprehend fleeing or concealed suspects" was "long-standing, widespread, and well-known." 27 F.3d at 1447.

"No decision of which we are aware intimated

that a policy of using dogs to apprehend concealed suspects, even by biting and seizing them, was unlawful." *Ibid.*

"[W]hen the defendants implemented the policy at issue in this case, it was not clearly established either that police dogs constituted deadly force, or that the use of dogs to find, bite, and hold concealed suspects was unreasonable." *Id.* at 1449.

Both California and federal law permit police officers to use objectively reasonable force in making an arrest and to prevent an escape. Cal. Pen. Code §835; *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989).

Numerous judicial decisions, relying on *Graham* and California law, have held that the use of police dogs is an objectively reasonable use of force when employed against criminal suspects who deliberately secrete themselves rather

than voluntarily surrendering. *Rivera,* 8 Cal.App.4th 1000, 10 Cal.Rptr.2d 785 (1992) (use of police dog objectively reasonable when robbery suspect fled burglary scene and hid himself in bushes; unknown to officers whether suspect was armed); *Robinette, supra,* 854 F.2d 909 (use of police dog objectively reasonable to find burglary suspect hiding inside darkened building in the middle of the night); *Mendoza, supra,* 27 F.3d 1337 (use of police dog reasonable against suspect who fled bank robbery.)

Police officers are not required to act at their peril. Neither are they penalized for their objective reasonable decisions even though, in hindsight, they are incorrect or mistaken. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham, supra,* 490 U.S. at 396.

In *Rivera, supra,* 8 Cal.App.4th 1000, the suspect used a crowbar to attempt to rob an ATM which was located

near the Oakland Airport at about 4:00 a.m. Unknown to the suspect, the ATM was under surveillance by several police officers. After the suspect crashed his getaway car during a police pursuit, he jumped out of the car and fled through a marshy area. The police formed a perimeter. The suspects ignored a shouted command to stop. Ultimately, a police dog handler, who also was called to the scene, released his police dog and gave him the command to "search and bite". The suspect, who was unarmed, was found and bitten. In reviewing the suspect's motion to suppress, the Court of Appeal found that the use of force was reasonably related in scope to the circumstances. The *Rivera* court stated:

> "In the present case Officer Garrahan articulated a very good reason for using force--a reason not disputed by appellant: he reasonably believed appellant was armed, ***and he knew appellant was fleeing the scene of the crime.***

Officer Garrahan reasonably feared for his safety, and that of others in the area." Id. at 1005, emphasis added.

The Court of Appeal refused to require the police officers to refrain from using a law enforcement tool which would reduce their personal risk of harm against a suspect whose own criminal behavior had created the danger:

> "'Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.' [Citation.] With the escalation of drug-related violence, especially in large cities such as Oakland, their job is difficult and dangerous enough already. . . . . That is to say, society cannot in good conscience require those it employs to enforce its laws to choose between (1) placing their own lives in peril or

(2) ignoring their sworn duty to investigate apparent criminal activity.' [Citation.]" *Id.* at 1007-1008, emphasis added.

Rivera, if anything, is even less compelling than the facts before the jury. In *Rivera*, unlike here, the police did not make any prior announcements warning the suspect about their intent to release a police dog which might find and bite him.

In *Robinette, supra*, 854 F.2d 909, the Sixth Circuit held that a biting police dog could be constitutionally used to flush out a burglary suspect who was hiding in a dark building. Like here, the handler repeatedly shouted warnings before unleashing the police dog, but obtained no response. The suspect actually died of neck wounds received from the dog. Far from constituting "deadly force," *Robinette* recognized that police dogs actually prevented the use of deadly force, thereby enhancing the safety of the officers, bystanders and the suspect:

"Indeed, *instead of generally causing deadly force* to be used to apprehend criminals, we believe that these [police] dogs often can help prevent officers from having to resort to, or be subjected to, such [deadly] force. Any attempt to apprehend a criminal suspect presents the officer with a difficult and frightening situation, but certainly an attempt to arrest the suspect hidden inside an unfamiliar building during the night time presents a particularly confusing one. The use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, *frequently enhancing the safety of the officers, bystanders and the suspect.*" *Id.* at 914, emphasis added.

And in *Mendoza, supra*, 27 F.3d 1337, the Ninth

Circuit unanimously affirmed a lower court decision that sheriff's deputies used objectively reasonable force in releasing a police dog to find a bank robbery suspect. *Mendoza* applied the same "use of force" analysis to police dogs as to other forms of physical restraint, such as use of a baton, or use of a gun. According to *Mendoza*, "'neither federal law nor California law clearly prohibits the training and/or use of police dogs to find, seize, and hold suspects, by biting if necessary.'" 27 F.3d at 1361.

As the Court of Appeal noted in *Rivera*: "it is a bit ironic for a suspect whose flight has necessitated the use of force to complain of it, when he could have avoided its employment by simply complying with the police command to halt." 8 Cal.App.4th at 1008

Plaintiff attempts to hold Officer Blevins and Chief Richardson civilly liable based upon his arguments about what the law should be, not what the law is now or what the law was in 1991. This is not the standard. "The contours of

the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." *Anderson, supra,* 483 U.S. at 640. "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1557 (11th Cir. 1993).

In *Wilson v. Meeks,* 52 F.3d 1547, 1552 (10th Cir. 1995), the Court of Appeals emphasized the need for clear legal precedent "in a particularized sense" that the right is clearly established. Police officers should not be strictly liable for failing to predict legal trends:

> "One purpose of this ['clearly established'] requirement is notice; officials cannot 'reasonably be expected to anticipate subsequent legal developments' nor 'fairly be said to "know" that the law forbade conduct not previously identified as unlawful.'

[Citations.]"

Plaintiff has not met this burden here. He does not establish a "bright line" which either Chief Richardson or Officer Blevins has crossed. He has not cited a "clearly established" weight of authority which would put reasonable officers in the position of these defendants on notice against using a police dog to locate and find a suspect who was actively evading and resisting arrest, and who posed a threat to officer and bystander safety.

Conclusion

For the foregoing reasons, the petition for certiorari should be denied.

Dated: September 29, 1995

Respectfully submitted,

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